NO. 84132-2

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF D.R. & A.R.

BRIEF OF RESPONDENT DEPARTMENT OF SOCIAL AND HEALTH SERVICES IN RESPONSE TO AMICUS CURIAE BRIEFS

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I. INTRODUCTION

Amici's briefs principally offer public policy arguments to support their claim for a blanket rule that counsel must be appointed for every child in every proceeding to terminate parental rights. Amici make this argument without regard to the circumstances and interests of the child, and without regard to whether the child's interests are adequately advanced by represented parties to the proceeding and the child's guardian ad litem.

Washington's lawmakers have made a different public policy choice. The Legislature's policy choice provides for the appointment of counsel when the trial court concludes that the child requires independent legal representation and requires children 12 and older to be informed of their right to request counsel. In this respect, Washington's statute provides for counsel when the child's interests are not adequately represented by other parties to the proceeding or the child's guardian ad litem, but does not require counsel to be appointed when they are.

While this is not the preferred public policy choice of amici, the Legislature's choice comports with due process requirements of the federal and state constitutions, and it is the Legislature's decision to make. Rather than focusing on public policy contentions, the Court should apply well-settled constitutional principles and hold that Washington's statute

authorizing appointment of counsel for children in proceedings to terminate parental rights satisfies the due process rights of children.

II. ARGUMENT

A. Amici's Policy Arguments Should Be Directed To The Legislature, Not The Court

Many of the arguments of amici in this case focus not on the issue presented to this Court—whether there is a constitutional right to an attorney for every child in every hearing to terminate parental rights—but on policy reasons why, in amici's view, appointment of counsel for children in all termination proceedings would be beneficial for children and society. *E.g.*, Br. of Mockingbird Soc'y at 3-4, 9-10 (arguing that the lack of an attorney contributes to feelings of powerlessness and victimhood and anti-social behavior, and that it is in the financial interest of the State to provide support and services for children, including appointed counsel); Br. of Washington State Psychological Ass'n at 2, 6 (arguing that provision of counsel is a matter of "public interest," in a child's best interest, and ultimately benefits society).

In addition, the articles and studies cited by amici are not limited to considering public policy reasons for representation of children in termination proceedings, and instead offer public policy arguments concerning representation of dependent children in a wider array of

contexts, or otherwise are inapposite. At most, the studies provide information that policymakers such as the Legislature can critically evaluate and use in crafting legislation to address this issue.

For example, amicus Washington State Psychological Association claims that research results have shown that legal representation of children in dependency and termination hearings leads to faster resolution of cases and increased awareness of children about their legal rights (citing Lucy Johnston-Walsh, et al., *Assessing the Quality of Child Advocacy in Dependency Proceeding in Pennsylvania* (Oct. 2010), http://www.jlc.org/images/uploads/Assessing_Quality_of_Child_Advocacy.pdf (last visited Jan. 13, 2011)).[1] The document cited is not a psychological study, but the results of a survey of lawyers and social workers in Pennsylvania. *Id.* at 1. The survey does not even attempt to compare outcomes between represented and non-represented children in dependencies and hearings to terminate parental rights. Rather, the report

[1] The Washington State Psychological Association also mistakenly suggests that the efforts of Court Appointed Special Advocates (CASAs) on behalf of children are ineffective or even harmful. Br. of Washington Psychological Ass'n at 11 (citing Caliber Assocs., *Evaluation of CASA Representation: Research Summary* (Jan. 20, 2004), http://nc.casaforchildren.org/files/public/community/programs/Statistics/caliber_casa_study_summary.pdf (last visited Jan. 13, 2011) (*Research Summary*)). In fact, the study cited warns against relying on its results, because children assigned CASAs were not randomly selected, but instead involved more severe cases. *Research Summary* at 2. The results of this study are also contradicted by the findings of an audit by the United States Department of Justice Office of the Inspector General. *See* Court Appointed Special Advocates for Children, *Evidence of Effectiveness*, http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5332511/k.7D2A/Evidence_of_Effectiveness.htm (last visited Jan. 13, 2011).

primarily focuses on what model of attorney representation to use and perceived flaws in the Pennsylvania foster care system, which already required counsel for children to be appointed. *Id.* at 2-3. Thus, rather than informing the issue presented to this Court, the cited report serves as a cautionary tale to those who believe that the automatic appointment of counsel for children will solve the challenges faced by the foster care system.

Similarly, another study cited by several amici to support an argument that appointment of counsel to children leads to beneficial outcomes is inapposite. *E.g.*, Br. of Mockingbird Soc'y at 12 n.22 (citing Andrew E. Zinn & Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* (Chicago: Chapin Hall Center for Children at the University of Chicago 2008)) (Palm Beach Study). The Palm Beach study is of limited usefulness here because it examined the effect of providing attorneys in both dependencies and hearings to terminate parental rights, while this Court has limited its review to appointing counsel in termination hearings. Palm Beach Study at 1. Moreover, the study examined the effects of appointing counsel for children in only some cases under ideal conditions of trained and motivated attorneys with small caseloads (35), and thus may not reflect the results of a system in which every child is automatically appointed

counsel. Palm Beach Study at 2, 4, 12. Finally, the Palm Beach Study should not be relied upon to support the argument that appointed counsel protects a child's interest in family integrity because the results showed an increase in termination of parental rights, that attorneys for the children were more likely to ensure earlier petitions for termination of parental rights, and noted complaints by social workers that attorneys for the children were less willing to give parents a chance to improve in order to reunify the family, particularly with younger children. *Id.* at 2, 9-10, 32.

Amici's public policy arguments largely demonstrate that the question of when and how dependent children should be represented in child welfare proceedings is the subject of considerable debate, and as discussed in Section B below, considerable variation among the states. *See, e.g.*, Randi Mandelbaum, *Revisiting The Question Of Whether Young Children In Child Protection Proceedings Should Be Represented By Lawyers*, 32 Loy. U. Chi. L.J. 1 (2000).[2]

As some amici or the sources they cite discuss, opinions and policies regarding attorney representation of children in foster care are receiving substantial attention in Washington and nationwide, and these

[2] The article demonstrates the unsettled nature of this issue as a policy question. The author of this article ultimately concludes that children should have attorneys to represent them in dependency and termination proceedings, but does not analyze whether such representation is a constitutional right. Mandelbaum, 32 Loy. U. Chi. L.J. at 89-90.

opinions and policies are undergoing significant evolution. *E.g.*, Br. of Children & Youth Advocacy Clinic at 9 (noting efforts by Washington Supreme Court Commission on Children in Foster Care to develop caseload and performance standards for lawyers representing children in dependencies and hearings to terminate parental rights at behest of Washington Legislature); First Star & Children's Advocacy Inst., *A Child's Right To Counsel: A National Report Card On Legal Representation For Abused & Neglected Children* 5-6 (2d ed. 2009) (*National Report Card*) (noting that the American Bar Association is working toward a Model Act on child representation in dependency court; that the U.S. Department of Health & Human Services has awarded a grant to study child representation that should pave the way for future national and state reform; and that "the tide is turning" in the movement for a child's right to counsel); Br. of Washington State Psychological Ass'n at 12 (citing study finding that "a consensus about how lawyers should represent children is beginning to emerge"); Br. of TeamChild[3] at 13 n.21 (noting the "growing emphasis on youth participation in child welfare proceedings . . ."). Since the hearing to terminate parental rights

[3] TeamChild filed a joint amicus curiae brief with Washington Defender Association, Society of Counsel Representing Accused Persons, The Defender Association, and Center for Children & Youth Justice. For convenience, the Department refers only to amicus curiae TeamChild.

in this case, the Washington Legislature has also twice amended the statute governing guardians ad litem (GAL) and appointment of attorneys, requiring children age 12 and over to be advised of their right to request an attorney and requiring courts to attempt to match special-needs children with GALs with specific training. Laws of 2010, ch. 180, § 2; Laws of 2009, ch. 480, § 2.

Although the Department acknowledges evolving public policy debates and choices regarding representation of children in child welfare proceedings, it disputes that these debates in any way support the contention that due process requires appointment of counsel for every child in every termination proceeding, as amici seek. The Legislature, and not this Court, is best suited for assessing these changing attitudes and policies regarding representation of children, and this Court should apply well-settled constitutional analysis to determine that Washington's statute comports with due process.

B. Other States' Legislative Choices Regarding Counsel For Children In Hearings To Terminate Parental Rights Do Not Establish A Constitutional Right To Counsel In Washington

Like counsel for the Children, amici cite the legislative approach taken by other states with respect to counsel for children in dependencies and hearings to terminate parental rights and suggest that the states are

nearly uniform in directing appointment of counsel in all circumstances. *E.g.*, Br. of Nat'l Ctr. for Youth Law[4] at 2-3. First, of course, the legislative choices of other states do not determine whether there is a constitutional right to appointed counsel for all children in all proceedings to terminate parental rights in Washington. Moreover, other states' legislative policy choices with respect to representation of children in child welfare proceedings are not nearly as monolithic or divergent from Washington's approach as amici suggest. Rather, examining the approaches of other states shows that there is a wide range of models for representation of children in such hearings, befitting the nature of the issue as a legislative choice.

Amici National Center for Youth Law echo the Children's claim that "[n]early 40 states provide a statutory right to counsel for children in dependency proceedings." Br. of Nat'l Ctr. for Youth Law at 2 (citing 29 state statutes; LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 Fam. Ct. Rev. 605, 610-11 (Oct. 2009); *National Report Card*). The cited references do not appear to support this claim. The cited law review article does make this

[4] National Center for Youth Law filed a joint amicus curiae brief with First Star, the National Association of Counsel for Children, the Children's Law Center of Los Angeles, Lawyers for Children, and KidsVoice. For convenience, the Department refers only to amicus curiae National Center for Youth Law.

assertion, but cites to secondary sources that do not support the claim.[5] The *National Report Card*, which cites to the statutory provisions of each state, appears to show 32 states that require counsel for children of any age, and two states that require appointment of counsel for children over a certain age (10 and 12). *See generally National Report Card* at 24-135. Moreover, the *National Report Card* shows a variety of state approaches to such hearings.

Virtually every state, including Washington, provides for the appointment of an adult to communicate the stated interests of the child to the court and to advocate for the best interests of the child, usually called a guardian ad litem (GAL).[6] *Id.* Some states require that the GAL be an attorney, but provide that the attorney shall advocate for the best interest of the child rather than the child's stated interest. *E.g.*, *id.* at 24, 34, 38 (discussing statutes of Alabama, California, and Colorado). This model

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[5] Taylor, 47 Fam. Ct. Rev. at 610-11 n.46 (citing *National Report Card*; Representing Children Worldwide, *250 Jurisdictions in 2005, How Children's Voices are Heard in Child Protective Proceedings*, http://www.law.yale.edu/RCW (last visited Jan. 11, 2011). The *National Report Card* is discussed above. The Representing Children Worldwide source, which itself does not cite to statutory provisions, shows 33 states as requiring counsel and notes up to six different models used by states for representation of children in dependency and termination proceedings.

[6] Many states, including Washington, allow for a volunteer Court Appointed Special Advocate (CASA) to fulfill the role of guardian ad litem. The CASA program was pioneered by King County Superior Court Judge David Soukup in 1977 and has since grown to include over 70,000 CASAs in 49 states. *See* http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301303/k.3DEC/The_CASA_Story__CASA_for_Children.htm (last visited Jan. 17, 2011).

appears to be the most common. *See* Nat'l Ass'n of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* 10 (2001), *available at* http://www.naccchildlaw.org/resource/resmgr/docs/nacc_standards_and_recommend.pdf (last visited Jan. 11, 2011). Some states, like Washington, do not require that the GAL be an attorney, but provide for the discretionary appointment of counsel for the child, the GAL, or both. *E.g.*, *National Report Card* at 42, 46, 56 (discussing statutes of Delaware, Florida, and Illinois). Some states appoint an attorney as a GAL, but provide for discretionary appointment of a second attorney to advocate for the stated interest of the child. *E.g.*, *id.* at 60, 62 (discussing statutes of Iowa and Kansas). Some states require appointed counsel only for children of a certain age. *E.g.*, *id.* at 76, 132 (discussing statutes of Minnesota and Wisconsin). Yet another model involves appointing an attorney specifically to advocate for the stated interests of the child. *E.g.*, *id.* at 90 (discussing New Jersey statute). The variety of models described in the *National Report Card* shows that Washington is not an outlier with respect to providing due process for children in hearings to terminate parental rights, but just one point on the wide spectrum of approaches used by states.

C. RCW 13.34.100, Which Authorizes Appointment Of Counsel For Children In Hearings To Terminate Parental Rights, Satisfies Federal Due Process Requirements

As set forth in detail in the Brief Of Respondent Department Of Social And Health Services (Resp. Br.), RCW 13.34.100 satisfies the due process requirements of the federal constitution, because in addition to the substantial due process protections mandated in a hearing to terminate parental rights, it authorizes the appointment of counsel for children in hearings to terminate parental rights in the sound discretion of the trial court. In a case addressing the exact type of hearing here, the United States Supreme Court held that a parent's right to due process did not require appointment of counsel to parents in every case, but only that counsel be appointed on a case-by-case basis. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). The Court held that the extraordinary remedy of requiring the appointment of counsel in every case had been applied only when a person's physical liberty was threatened. *Id.* at 25. The Court thus found a presumption that due process did not require the appointment of counsel at public expense unless physical liberty were threatened, and that this presumption must be balanced against the three-factor *Mathews*[7] test when examining what process was due. *Id.* at 27. Applying the *Mathews*

[7] *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

factors, the Court concluded that appointment of counsel might be required in an individual case if a parent's interests were at their strongest, the State's interests were at their weakest, and the risk of error were at its peak. *Lassiter*, 452 U.S. at 31. The Court left this determination to the trial court on a case-by-case basis. *Id.* RCW 13.34.100 satisfies the *Lassiter* requirements because it allows for the appointment of counsel for the child whenever the child is at least 12 years old and requests counsel, and whenever the GAL or the trial court determines that independent representation is needed.

Amici's attempts to distinguish *Lassiter* fail because application of the *Mathews* balancing test supports no greater right to counsel for a child than for a parent. The Department has addressed in detail the three factors of the *Mathews* balancing test, and confines the following additional argument to responding to contentions by amici. *See* Resp. Br. at 30-41.

The first *Mathews* factor is "the private interest that will be affected by the official action." *Mathews*, 424 U.S. at 335. Amici variously assert that these interests include the child's physical liberty; the child's interest in safety, health, and welfare; and preserving family integrity. Preliminarily, a child's physical liberty is not threatened by a hearing to terminate parental rights. As explained in the Department's response brief, a hearing to terminate parental rights does not determine

the placement of a child; regardless of its outcome, the dependency continues and the child is not returned to the parent unless the reasons for the dependency no longer exist. Resp. Br. at 6-8, 32. Moreover, a child does not have a physical liberty interest in avoiding foster care. As the United States Supreme Court has recognized, "'juveniles, unlike adults, are always in some form of custody,' and where the custody of the parent or legal guardian fails, the government may (indeed we have said *must*) either exercise custody itself or appoint someone else to do so." *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (citation omitted) (quoting *Schall v. Martin*, 467 U.S. 253, 265, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984)). Children in foster care do not have a *physical* liberty interest in a particular custodial placement.

Some amici generally assert a child's liberty interest in health, safety, and welfare. This Court has described a child's substantive due process right to be "free from unreasonable risks of harm and a right to reasonable safety." *Braam v. State*, 150 Wn.2d 689, 700, 81 P.3d 851 (2003). To the extent that amici suggest that a child is placed in unreasonable risk of harm in the foster care system, this interest is not protected by providing counsel to a child in a hearing to terminate parental rights because the hearing does not determine placement of the child nor

the services available to children. Rather, the hearing determines only whether to terminate parental rights.

The final interest asserted by amici, the right of the child to family integrity, is less significant than a parent's for *Mathews* purposes for two reasons. First, unlike a parent in a hearing to terminate parental rights, a child will not always want to preserve family integrity, and amici have identified no authority to suggest that children have a liberty interest in severing family integrity. Second, unlike children, parents not only have a right to family integrity, but also a right to the care, custody, and control of their children—a right long recognized as among the most fundamental constitutional rights. *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (holding that parent's right to care, custody, and control was violated by statute allowing court to order visitation even when in the best interests of child); *see also In re Welfare of A.B.*, 168 Wn.2d 908, 232 P.3d 1104 (2010) (holding that trial court must find parent unfit before considering daughter's best interest in terminating parental rights).

The second *Mathews* factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. Amici argue that, unlike a parent, a child is always incapable

of adequately representing her interests in a hearing, and thus the risk of error is greater than when parents are unrepresented. *E.g.*, Br. of TeamChild at 5. This argument ignores that children in hearings to terminate parental rights are appointed a GAL, who is required by statute to advocate for the best interest of the child and to communicate to the court the child's stated interest. RCW 13.34.105(1). It also overlooks that in many cases, if not most, the attorney for the parent or the attorney for the Department will advocate the child's preferred outcome and represent the child's interests. *In re Involuntary Termination of Parental Rights of Kapcsos*, 468 Pa. 50, 58, 360 A.2d 174 (1976). While the State acknowledges that there are cases in which a child's interests may not be otherwise adequately represented and should be advocated by a lawyer for the child, the statute allows for the appointment of counsel in any such circumstance. A child in a proceeding to terminate parental rights is provided far more procedural protections and is far more likely to have her interests represented adequately without an attorney than is an unrepresented parent. Accordingly, the risk of error and value of additional safeguards supports no greater right to counsel for a child than for the child's parent.

In assessing the value of additional safeguards, this Court should also keep in mind that neither the Children nor amici have asked the Court

to determine what role an attorney for the child will play, arguing instead that this decision should be left to policymakers. *E.g.*, Br. of Nat'l Ctr. For Youth Law at 15. In addition to reinforcing that the issue presented to the Court is one for policymakers, this argument ignores that the Court cannot adequately assess the value of automatically requiring an attorney for each child in each hearing to terminate parental rights without knowing what the attorney's role would be. Moreover, many of the arguments presented by amici with respect to the importance of having an attorney to represent children assume that the child is willing and capable of expressing his or her interests and that the attorney will advocate for the stated interest of the child. *E.g.*, Br. of Mockingbird Soc'y at 4, 7 (arguing that children must be given "voice" and have their express interests advocated); Br. of TeamChild at 10-11 (arguing that attorneys can provide counsel, gain trust through confidentiality, facilitate the child's participation at trial, and focus solely on the child's interests as distinguished from a GAL who advocates for the child's best interests); Br. of Nat'l Ctr. For Youth Law at 11-14 (arguing that only attorneys can advocate for the positions of their clients, that attorneys provide confidentiality, and can achieve the client's desired results).

As the Legislature has recognized by requiring children age 12 and older to be advised of their right to request counsel, there is a substantial

difference between the role of an appointed attorney with respect to a mature child capable of understanding and articulating his or her interests, and representation of an infant or other child incapable of such articulation. *See* RCW 13.34.100(6). Argument of amici, which focuses on the value of an attorney advocating for the stated interest of a child, implicitly recognizes this distinction as well. Nonetheless, amici argue that blanket appointment of counsel for all children in all termination proceedings is constitutionally required.[8]

The third *Mathews* factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Amicus generally ignore this factor or refer simply to the cost associated with appointing counsel for children. But, as with the first two factors, this factor weighs more heavily in favor of providing counsel to a parent rather than a child. The State has interests in protecting the physical, mental, and emotional health of children and in limiting fiscal and administrative burdens. As explained in the Department's response brief, automatically providing attorneys for children in hearings to

[8] Although unclear, amicus Mockingbird Society suggests that while attorneys can serve a valuable role in representing all children, the *right* to counsel attaches when the child is mature and mentally competent enough to direct his attorney or able to fully understand the ramifications of his decisions. Br. of Mockingbird Soc'y at 19.

terminate parental rights can lead to erroneous results. Resp. Br. at 36-38. Moreover, unlike providing an attorney for parents, providing attorneys for children could, in some circumstances, itself be harmful to a child by pressuring a child to articulate the wrenching decision of whether to advocate for termination of parental rights. Providing attorneys to children without regard to their maturity or developmental abilities increases this possibility.

Similarly, the fiscal and administrative burdens are greater if attorneys are required for every child in every hearing to terminate parental rights. While providing attorneys to parents results in the appointment of one or two attorneys, providing an attorney for each child can result in one, two, or more additional attorneys being appointed depending on the number of children involved. Appointing numerous attorneys is not only a fiscal burden, but may also slow the process inordinately.

In sum, contrary to amici's arguments, the *Mathews* balancing test weighs more heavily in favor of providing counsel to parents than children. Parents have no absolute, constitutional right to counsel in hearings to terminate parental rights, and it follows even more strongly that children have no greater right.

D. RCW 13.34.100 Does Not Violate The Due Process Clause Of The Washington Constitution

Several amici argue that the Washington Constitution provides greater due process protection to the parent-child relationship than the federal constitution, relying on the *Myricks* and *Luscier* opinions and later cases citing to these opinions. Br. of TeamChild at 8-9; Br. of American Civil Liberties Union (ACLU) at 16-17 (citing *In re Welfare of Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974); *In re Welfare of Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975)). In *Myricks* and *Luscier,* this Court held that parents had a federal and state constitutional right to an attorney in dependency and termination of parental rights proceedings. *Myricks*, 85 Wn.2d at 254; *Luscier*, 84 Wn.2d at 139. As explained more fully in the response brief, at pages 42-44, the *Myricks* and *Luscier* opinions in no way suggest that the Washington Constitution provides greater due process protection than the federal constitution. Furthermore, later opinions cite *Myricks* and *Luscier* as equating the two constitutional provisions. *See* Resp. Br. at 43 (and cases cited therein). Although some later opinions have suggested that *Myricks* and *Luscier* may still be valid on state constitutional grounds, this Court has not addressed the issue since the right to counsel for parents in hearings to terminate parental rights and dependency proceedings was codified. *See In re Marriage of King*, 162 Wn.2d 378, 383 n.3, 174 P.3d

659 (2007) ("While the federal due process underpinnings of these decisions may have been eroded by the United States Supreme Court in *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), since our holdings have been legislatively codified under RCW 13.34.090, we need not address the continuing validity of our cases.").

Amicus ACLU argues that this Court need not engage in a *Gunwall* analysis to determine if the state due process clause provides greater protection than the federal due process clause because there is no federal case directly on point addressing the right to counsel for children in hearings to terminate parental rights. The ACLU cites no authority that states that there must be a federal case directly on point before the Court undertakes a Gunwall analysis. Nor does it explain the logic in jettisoning a *Gunwall* analysis in light of parallel federal and state due process provisions, the closely analogous decision of the United States Supreme Court in *Lassiter*, or this Court's repeated application of the *Mathews* balancing test. *E.g.*, *Ongom v. Dep't of Health*, 159 Wn.2d 132, 138 n.5, 148 P.3d 1029 (2006); *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995). In fact, this Court has engaged in a *Gunwall* analysis without regard to whether federal authority addressed precisely the same circumstances. *E.g.*, *In re Marriage of King*, 162 Wn.2d at 391-95

(applying *Gunwall* analysis to determine if state due process required attorney for mother in child custody dispute pursuant to divorce decree where federal case held that parent not automatically entitled to attorney in hearing to terminate parental rights); *State v. Manussier*, 129 Wn.2d 652, 921 P.2d 473 (1996) (applying *Gunwall* analysis to general proposition that state due process clause provides greater protection than federal due process clause).[9]

Even if the ACLU were correct that this Court should ignore the *Gunwall* factors and engage in an independent state constitutional analysis, the *Lassiter* opinion would remain as powerful persuasive authority. *State v. Fortune*, 128 Wn.2d 464, 474-75, 909 P.2d 930 (1996) (noting that while federal cases are not binding for purposes of interpreting our state's constitution, they can be " 'important guides' " in our analysis) (quoting *State v. Gunwall*, 106 Wn.2d 54, 61, 720 P.2d 808 (1986))). This principle applies with even greater force here because there

[9] To bolster its argument that the Court need not examine the six factors enumerated in *Gunwall*, the ACLU also mistakenly argues that the federal district court in *Kenny A. ex rel. Winn v. Purdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005), based its decision requiring counsel for children in dependencies and hearings to terminate parental rights on the Fourteenth Amendment, when in fact the opinion rested on the Georgia state constitution. *Id.* at 1359; Br. of ACLU at 13 n.3. The ACLU also suggests that *Lassiter* invited states to independently interpret their state constitutions. Br. of ACLU at 13-14 (quoting *Lassiter*, 452 U.S. at 33-34). The *Lassiter* opinion did nothing more than recognize that state legislatures were free to provide counsel more broadly than required by minimum due process standards. *Lassiter*, 452 U.S. at 33-34.

is no established method of state constitutional due process analysis, and the ACLU offers none.

The ACLU also argues that pre-existing state law supports finding that our state constitution provides greater due process protection to children in hearings to terminate parental rights, in part because state statutes, enacted long after our state constitution, required appointment of counsel for parents in hearings to terminate parental rights. Br. of ACLU at 15-16 (citing RCW 13.34.090(2)). The Department disagrees that the Court should look to recent statutory developments in the law to evaluate the scope of constitutional rights. *See* Resp. Br. at 46-47. However, even if this Court were to do so, the ACLU does not explain how this statute providing counsel for parents in hearings to terminate parental rights supports a claim that children must be appointed attorneys in such hearings. Similarly, the ACLU does not explain how a statute that allows, but does not require, appointment of counsel for children in hearings to terminate parental rights supports a constitutional right that attorneys be required in such hearings in all circumstances. Br. of ACLU at 16 (citing RCW 13.34.100(6)).

A careful application of the *Gunwall* factors shows that the state due process clause does not provide greater protection than the federal due process clause in determining whether to require appointment of counsel

for every child in every hearing to terminate parental rights. *See* Resp. Br. at 44-48. Accordingly, RCW 13.34.100 does not violate the state's due process clause.

III. CONCLUSION

The Department respectfully requests the Court to uphold RCW 13.34.100 providing for the appointment of counsel for children in termination proceedings.

RESPECTFULLY SUBMITTED this 18th day of January 2011.

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